IN THE

Supreme Court of the United States

October Term, 1960

No. 11

RAYMOND P. GALLAGHER, CHIEF OF POLICE OF THE CITY OF SPRINGFIELD, Massachusetts,

Appellant,

vs.

CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC.,

and

IRVING HEAFITZ, MORRIS CHAITOVSKY and RUTH B. COHEN, suing on behalf of themselves and others similarly situated; and RABBI MOSES D. SHEINKOPF, CHIEF ORTHODOX RABBI OF THE UNITED ORTHODOX CONGREGATIONS OF SPRINGFIELD AND PRESIDENT OF THE MASSACHUSETTS COUNCIL OF RABBIS, suing on behalf of himself and the Rabbis similarly situated,

Appellees.

No. 67

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

vs.

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL *AMICI CURIAE*

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BRIEF OF SYNAGOGUE COUNCIL OF AMERICA AND NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL *AMICI CURIAE*

Interest of the *Amici*

This brief is submitted on behalf of the Synagogue Council of America and the National Community Relations Advisory Council.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly of America, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogue of America, representing the Conservative congregations.

The National Community Relations Advisory Council is a co-ordinating body comprised of the following national lay Jewish organizations, in addition to the congregational bodies mentioned above, concerned with American Jewish community relations:

American Jewish Congress
Jewish Labor Committee
Jewish War Veterans of the United States

and fifty-two local Jewish Community Councils, including all the major cities in the United States.[1]

The organizations affiliated with the Synagogue Council of America and the National Community Relations Advisory Council include in their membership the over-

[1] The constituent Community Councils are the following: Jewish Welfare Fund of Akron; Albany Jewish Community Council; Atlanta Jewish Community Council; Federation of Jewish Charities of Atlantic City, N. J.; Baltimore Jewish Council; Jewish Community Council of Metropolitan Boston; Jewish Community Council, Bridgeport, Conn.; Brooklyn Jewish Community Council; Community Relations Committee of the Jewish Federation of Camden County, N. J.; Jewish Community Federation, Canton, Ohio; Cincinnati Jewish Community Relations Committee; Connecticut Jewish Community Relations Council; Jewish Federation of Delaware; Jewish Community Council of Metropolitan Detroit; Eastern Union County, N. J., Jewish Community Council; Jewish Community Council of Easton and Vicinity; Jewish Community Council of Essex County, New Jersey; Jewish Community Council of Flint, Mich.; Jewish Federation of Fort Worth, Tex.; Community Relations Committee of the Hartford (Conn.) Jewish Federation; Indiana Jewish Community Relations Council; Indianapolis Jewish Community Relations Council; Jewish Community Council, Jacksonville, Florida; Community Relations Bureau of the Jewish Federation and Council of Greater Kansas City; Kingston, N. Y. Jewish Community Council; Community Relations Committee of the Jewish Federation Council of Greater Los Angeles; Milwaukee Jewish Council; Jewish Community Relations Council of Minnesota; Nashville Jewish Community Council; Jewish Federation of New Britain, Conn.; New Haven Jewish Community Council; Jewish Community Relations Council of Oakland, Calif.; Jewish Community Council of Paterson, N. J.; Jewish Community Council of Peoria, Ill.; Jewish Community Council, Perth Amboy, N. J.; Jewish Community Relations Council of Greater Philadelphia; Jewish Community Relations Council, Pittsburgh; Richmond Jewish Community Council; Jewish Community Council, Rochester, N. Y.; Jewish Community Relations Council of St. Louis; Community Relations Council of San Diego; San Francisco Jewish Community Relations Council; Jewish Community Council, Schenectady, N. Y.; Scranton-Lackawanna Jewish Council; Jewish Community Council of Toledo; Tulsa Jewish Community Council; Jewish Community Council, Utica; Jewish Community Council of Greater Washington (D. C.); Jewish Federation of Waterbury; Jewish Community Relations Council of the Jewish Federation of Youngstown, Ohio.

whelming majority of Americans affiliated with Jewish organizations. We believe, therefore, that in submitting this brief we speak for the greater part of American Jewry.

Our interest in the cases before this Court is twofold. In the first place, the appellees in the *Crown Kosher* case and the appellants in *Braunfeld* v. *Gibbons* are Orthodox Jews who observe the seventh day of the week as their Sabbath and refrain from all secular business and labor on that day. Enforcement of compulsory Sunday observance laws against them constitutes, in our view, a serious infringement of their civil, religious and economic rights and imposes a heavy burden upon their adherence to their religious beliefs.

However, our concern extends beyond the interests of the particular parties to this litigation. We would be concerned even if Braunfeld and the proprietors of Crown Kosher were not Jews or observers of the seventh day of the week as the Sabbath. We believe that the principle of religious liberty is impaired if any person is penalized for adhering to his religious beliefs, or for not adhering to any religious belief, so long as he neither interferes with the rights of others nor endangers the public peace or security.

For these reasons we sought and obtained the consent of counsel for the parties to submit this brief *amicus curiae*.

Preliminary Statement

The two cases in which this brief is filed challenge the constitutionality respectively of the Massachusetts and Pennsylvania Sunday laws as enforced against retail merchants of the Jewish faith who observe Saturday as their Sabbath and refrain from all labor or secular business on that day. Both cases were instituted in statutory Federal District Courts for injunctions to prevent enforcement of the statutes against the respective plaintiffs. The complaints in both assert that the assailed statutes are unconstitutional because they establish the first day of the week as a religious day, contrary to plaintiffs' religion, restrict the plaintiffs in the free exercise of their religion and deny to them the equal protection of the law.

The Statutes Involved

The statute involved in the Massachusetts suit is Mass. G. L. [Ter. Ed.] c. 136, and specifically sections 5 and 6 thereof. The statute involved in Pennsylvania is P. L. No. 212, 18 Purd. Stat. Sec. 4699.10. Both statutes make it a penal offense to engage in a variety of activities upon the first day of the week. The relevant sections of both statutes are set forth as an Appendix to this Brief.

The Questions to Which This Brief is Addressed

This brief is addressed to three principal issues:

1. Do the assailed statutes unconstitutionally violate the First Amendment to the Federal Constitution as prohibited laws respecting an establishment of religion?

2. Do they unconstitutionally violate the Amendment as laws prohibiting the free exercise of religion?

3. Do they unconstitutionally violate the Fourteenth Amendment as laws depriving plaintiffs of their liberty and property without due process of law and denying them the equal protection of the laws?

Summary of Argument

Both the Massachusetts and Pennsylvania Sunday laws are religious laws and their enforcement is therefore beyond the comptence of a state constitutionally enjoined from enacting any law respecting an establishment of religion.

Even if they should be deemed welfare laws they unconstitutionally restrain the religious freedom of persons impelled by conscience to observe a day other than Sunday as their weekly day of rest.

The laws are so lacking in rationality in respect to the distinction between activities permitted on Sunday and those prohibited and with respect to persons permitted to engage in business on Sunday and those for-

bidden to do so that they must be adjudicated completely arbitrary. Their enforcement, therefore, constitutes a deprivation of liberty and property without due process of law and a denial of the equal protection of the laws.

Argument

I. The Sunday laws are religious statutes whose enforcement violates the First Amendment ban on laws respecting an establishment of religion.

A. The Applicability of the First Amendment to the States

It is no longer open to question that the religion clause of the First Amendment to the Federal Constitution is applicable to the States no less than to the Federal Government. Moreover, its applicability extends equally to the no establishment and the free exercise provisions. The states and the Federal government are therefore equally forbidden to enact or enforce any laws respecting an establishment of religion or prohibiting its free exercise. *Cantwell* v. *Connecticut*, 310 U. S. 296; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Marsh* v. *Alabama*, 326 U. S. 501; *Everson* v. *Board of Education*, 330 U. S. 1; *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203; *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94.

B. The Meaning of the No Establishment Clause

In the *Everson* case, *supra*, and again in the *McCollum* case, *supra*, the Supreme Court spelled out the meaning of the no-establishment clause in the following definitive language:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

The First Amendment, the Court held in both cases, imposes upon government an obligation of neutrality, not merely as between competing sects and faiths, but also as between religion and non-religion. It forbids the use of law as an instrument of church policy or an engine to further church purposes. In short, the First Amendment bars governmental intervention in religious affairs.

C. The Sunday Laws as Religious Laws

It follows that if the Sunday laws in issue herein are primarily and principally religious laws their enforcement constitutes a violation of the no establishment clause. This is so for a number of reasons. In the first place, it involves governmental intervention in religious affairs.

Secondly, it constitutes governmental aid to religion to a substantial extent. Third, it violates the obligation of neutrality as between religion and non-religion. Finally, it obviously prefers one religion, Sunday observing Christianity, over all other religions, including Saturday observing Christianity and Judaism.

We submit that any objective examination of both the Massachusetts and the Pennsylvania Sunday laws must lead to the conclusion that they are essentially religious laws. This conclusion is based on the historical background of the laws and is reinforced by their contemporary operation and effect.

D. *Historical Background of the Massachusetts Sunday Law*

Compulsory observance of the Sabbath goes back, of course, to Mount Sinai, and to the command that:

> "Ye shall keep the sabbath therefore; for it is holy unto you; every one that defileth it shall surely be put to death; for whosoever doeth any work therein, that soul shall be cut off from among his people. Six days may work be done; but in the seventh is the sabbath of rest, holy to the Lord; whosoever doeth any work in the sabbath day, he shall surely be put to death." *Exodus* 31:14, 15.

The Sabbath of Sinai was the seventh day of the week. (It is rather ironical that persons facing criminal prosecution in the present case are those who comply with the Biblical command to observe the Sabbath on the seventh day of the week.) The earliest recognition of Sunday by Christians is recorded by Justin Martyr, who reported

that in the second century the Christians in Rome gathered on that day to hear readings from the Scriptures, participate in common prayer, and dine together, in the manner in which the Jews celebrated the Biblical Sabbath. Pfeffer, *Church, State and Freedom*, p. 228.

Sunday was selected as the day of the resurrection of Jesus, but it was also the day observed by the Mithraists, another popular cult, as the day of the Sun-god. Constantine, as part of his program of empire unification, promulgated the first compulsory Sunday law in the year 321. The law read:

> All judges and city people and the craftsmen shall rest upon the venerable Day of the Sun. Country people, however, may freely attend to the cultivation of the fields, because it frequently happens that no other days are better adapted for planting the grain in the furrows or the vines in the trenches. So that the advantage given by heavenly providence may not for the occasion of a short time perish.

At about the same time soldiers in the army were commanded to worship on the "Lord's Day"; lawsuits were prohibited on that day, and circus spectacles and theatrical shows were likewise forbidden.

Thereafter Sunday observance laws were promulgated in Garel under the Merovingian kings and Charlemagne, and in England under the Anglo-Saxon kings. One American court epitomized the history of Sunday legislation as follows:

> "All Sunday legislation is the product of pagan Rome; the Saxon laws were the product of Middle Age legislation of the Holy Roman Empire. The English laws are the expansion of the Saxon, and the American

> are the transcript of the English." * * * During the Middle Ages, the civil authorities exercised the right to legislate in religious matters after the manner of the Jewish theocracy.—Quoted in Johnson and Yost, *Separation of Church and State in the United States*, p. 222.

The first Sunday law to be promulgated in what is now the United States was the Virginia law of 1610. This law, a product of the church-state union of that colony, provided:

> "Every man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day, and in the afternoon to divine service, and catechising, upon pain for the first fault to lose their provision and the allowance for the whole week following; for the second, to lose the said allowance and also be whipt; and for the third to suffer death." 1 Hening, Virginia Statutes, p. 123.

Massachusetts Bay Colony was established as a union of church and state, and it is therefore hardly surprising that almost simultaneously with its receipt of a charter it should enact a compulsory Sunday observance law. This law, enacted in 1629, read:

> To the end the Sabbath may be celebrated in a religious manner, we appoint that all that inhabit the plantation, both for the general and particular employments, may surcease their labor every Saturday throughout the year at 3 of the cloek in the afternoon, and that they spend the rest of the day in catechising and preparation for the Sabbath, as the ministers shall direct. *American State Papers on Freedom of Religion*, p. 30.

The "Records of the Governor and Company of the Massachusetts Bay in New England" report that in November of 1630 "It is ordered, that John Baker shall be whipped for shooting at fowl on the Sabbath day." *Ibid.*

Five years later, in 1635, the Massachusetts General Court decreed that:

> Whereas complaint hath been made to this Court that diverse persons within this jurisdiction do usually absent themselves from church meetings upon the Lord's Day, power is therefore given to any two Assistants to hear and censure, either by fine or imprisonment all misdemeanors of that kind committed by any inhabitant within this jurisdiction, provided they exceed not the fine of 5 shillings for one offense. *Ibid.*

As can be seen, this ordinance was aimed at assuring church attendance on the Lord's Day. This and avoidance of profanation by servile work have been the two motivations of Sunday laws. That inducing church attendance is a primary motivation of Sunday laws is evident from the fact that the first amendment ever enacted to a Sunday law to allow sports, a statute enacted in England in 1618 during the reign of the sports-loving James I, specifically limited permission to engage in sports on the Lord's Day to the period after church services. Johnson and Yost, *Separation of Church and State*, p. 221. That this motivation is still a primary factor in the statutes here in issue is evident by the fact that they too permit engagement in or witnessing of sports on the Lord's Day only after 2 P.M., *i.e.*, after church services. Mass. G. L. chapter 136, §§21-26; Penn. P. L. 74 sec. 2, 4 Purd. St. Sec. 82.

The progenitor of the Massachusets compulsory Sunday observances law here in issue was "An Act for the Better Observation and Keeping of the Lord's Day" promulgated in the Bay Colony in 1692, as can be seen from a comparison of the two statutes. The 1692 statute read:

> That all and every person and persons whatsoever, shall on that day carefully apply themselves to duties of religion and piety, publicly and privately; and that no tradesman, artificer, laborer, or other person whatsoever, shall upon the land or water, do or exercise any labor, business or work of their ordinary callings; nor use any game, sport, play, or recreation on the Lord's Day, or any part thereof (works of necessity and charity only excepted); upon pain that every person so offending shall forfeit five shillings * * *. And in case any such offender be unable or refuse to satisfy such fine, to cause him to be put in the cage, or set in the stocks, not exceeding three hours. *American State Papers on Freedom of Religion*, p. 37.

As early as 1631 Roger Williams recognized that the Massachusetts compulsory Sunday law was a religious law whose enforcement was inappropriate by a secular state. Williams was of the view that human tribunals were authorized to punish only offenses against the second of the Two Tables (Ten Commandments), *i.e.*, Commandments 6 to 10, since these dealt with offenses of man against man, and not offenses against the First Table (Commandments 1 to 5), since these involved man's relationship to God. The journal of Governor Winthrop of Massachusetts Bay in 1631 contains the following notation:

> At a court holden at Boston * * * a letter was written from that court to Mr. Endecott to this effect: That

* * * Mr. Williams * * * had declared his opinion that the magistrate might not punish the breach of the Sabbath, * * * as it was a breach of the first table. Hosmer, I *Winthrop's Journal*, 61-62.

E. *Historical Background of the Pennsylvania Sunday Law*

The historical background of the Pennsylvania Sunday Law is in essence similar to that of the Massachusetts law.

The original Pennsylvania Sunday Law of 1682, *Duke of Yorke's Book of Laws* 1676-1682, pages 107, 108 provided inter alia, as follows:

> "Whereas, the glory of Almighty God and the good of Mankind, is the reason & end of government, and, therefore, government in itself is a venerable Ordinance of God. And forasmuch as it is principally desired and intended by the Proprietary and Governor and the freemen of the Province of Pennsylvania and territories thereunto belonging, to make and establish such Laws as shall best preserve true Christian and Civil Liberty, in opposition to all Unchristian, Licentious and unjust practices, (Whereby God may have his due, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.
>
> "Be It Therefore Enacted by William Penn, Proprietary and Governour, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid, in Assembly met, and by the Authority of the same, That These follow-

ing Chapters and Paragraphs shall be the Laws of Pennsylvania and the territories thereof. "Chap. 1. Almighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind * * *

"BE IT ENACTED BY THE AUTHORITY AFORESAID, That * * * to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, BE IT FURTHER ENACTED BY THE AUTHORITY AFORESAID, That, according to the example of the primitive Christians, and for the ease of the Creator, Every first day of the week, called the Lord's Day, People shall abstain from their usual and common toil and labour. That whether Masters, Parents, Children, or Servants, they may the better dispose of themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best suite their respective persuasions."

The foregoing Act of 1682 was substantially re-enacted on November 27, 1700 and on January 12, 1705.

The Act of April 22, 1794, Section 1, 3 Smith's Laws, page 177, from which the present law is derived, provided inter alia:

"That from and after the first day of August next, if any person shall do or perform any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practice any unlawful game, and be convicted thereof, every such person, so offending shall, for every such offence, forfeit and pay four dollars, to be levied by distress; or in case he or she shall refuse or neglect to pay the said sum,

or goods and chattels cannot be found, whereof to levy the same by distress, he or she shall suffer six days imprisonment in the house of correction of the proper county. PROVIDED ALWAYS, That nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment, for the use of sojourners, travellers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families, on the Lord's Day, commonly called Sunday, nor to the delivery of milk, or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day."

F. Latter Day Rationalizations

In the light of this history, the religious origin of both the Massachusetts and Pennsylvania Sunday laws is hardly controvertible. Indeed, it is not controverted at all. In both states the courts from their earliest days and on frequent occasions since have traced the present Sunday laws to the Colonial ancestors.

In Massachusetts, in the very early case of *Pearce v. Atwood*, 13 Mass. 324, involving an arrest made on Sunday, the court described the Lord's Day law as "a statute enacted for the sole object of ensuring reverence and respect for one day of the week, in order that religious exercises should be performed without interruption from common and secular employments." In *Com. v. White*, 190 Mass. 578, the court said quite simply (at p. 581) that the law "was originally inserted to secure the observance of the Lord's Day in accordance with the views of our ancestors.

and it ever since has stood and still stands for the same purpose." See also, *Com.* v. *Dextra*, 143 Mass. 28; *Davis* v. *Somerville*, 128 Mass. 594.

Quite revealing as to the religious background of the Pennsylvania law is the following statement by a Pennsylvania court:

> The present act (of 1794) was enacted as a direct result of the yellow fever plague of 1793 which ran rampant in Philadelphia. The plague was regarded as 'a scourge upon a wicked people.' The Pennsylvania legislature hastened to legislate away the wickedness of the people by shackling the devil in his most prosperous day. *Commonwealth* v. *Pedano*, 33 D&C 551, 553.

Perhaps the frankest statement by a Pennsylvania court was made in 1927 by the Supreme Court of that state, in the case of *Commonwealth* v. *American League Baseball Club of Philadelphia*, 290 Pa. 136 at 143:

> Christianity is part of the common law of Pennsylvania (*Updegraph* v. *Commonwealth*, 11 S & R 393) and its people are Christian people. Sunday is the holy day among Christians.

Only in recent years, particularly after it was recognized that the First Amendment's ban on laws respecting an establishment of religion or prohibiting its free exercise is applicable to the states, has there been an effort to justify the compulsory Sunday laws as welfare rather than religious statutes. This newer theory is that these laws have been divorced from their religious origin and that they have now become purely secular laws, enacted under the police power of the State to ensure at

least one day rest in seven. In Massachusetts, this justification was first expressed in *Com.* v. *Has,* 122 Mass. 40, in the following language:

> It [the Sunday law] is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, any one who deems another day more suitable for rest or worship may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community.

Significantly, the record in *Com.* v. *Has,* shows that the complaint in that case was that the defendant kept his shop open on Sunday "to the great scandal of religion, against good morale and manners, and against the peace of said Commonwealth."

In *Com.* v. *McCarthy,* 244 Mass. 484, the court, after quoting extensively from *Davis* v. *Somerville,* *supra,* re-

emphasized that the statute "was enacted to secure respect and reverence for the Lord's Day."

Similar rationalizations are to be found in Pennsylvania cases. *Specht* v. *Commonwealth*, 8 Pa. 312, 323; *Commonwealth* v. *Bauder*, 14 D & C 2d 571.

We respectfully submit that the rationalization of these cases is unreal, bordering, in fact, upon the fictitious. We submit that what is essentially a religious law cannot be made a secular or civil law simply by calling it such. We offer the following reasons in support of our claim that the Massachusetts and Pennsylvania compulsory Sunday observance laws here in issue are what they always have been—religious laws.

1. Their origin, as we have seen, is incontrovertibly religious. Neither the Massachusetts nor the Pennsylvania legislature has ever evidenced any intent to change the religious motivation. At no time have the Old Colonial laws been repealed and replaced by new laws based upon the legislative finding that a day of rest is necessary for reasons of health. On the contrary, the courts have consistently held that the present law "still stands for the same purpose" as the concededly religious Colonial law. *Com* v. *White*, 190 Mass. 578, 581; *Com.* v. *Wesbit*, 34 Pa. 398. This conclusion is fortified by the fact that the Massachusetts statute at least even today does not speak of "Sunday," but of "the Lord's Day." Such designation of the day of compulsory abstinence from secular affairs can hardly be called secular.

2. In *Com* v. *Has*, *supra*, the Massachusetts court said that the "act imposes upon no one * * * attendance upon

any form of worship." Yet, the act permits participation and engaging in sports only after 2 P.M., (in Pennsylvania, P. L. 74 Sec. 2, 4 Purd. St. Sec. 82) and this limitation, as we have seen, is motivated by a desire not to allow activities which some might find more attractive than attendance at church. While thus forbidding all pleasurable and profitable activities during the time of church services may not force a person to go to church, it certainly influences him in that direction; and in the *Everson* and *McCollum* cases, *supra*, the Supreme Court held that under the no-establishment clause a State can neither force "nor influence a person to go to or remain away from church * * *." In any event, we can think of no reasonable explanation for the limitation of sports to the afternoon other than to avoid competition with church services.

In *Zorach* v. *Clauson*, 343 U. S. 306, this Court held it permissible for public school authorities to excuse children from attending school for an hour each week if they participate in religious instruction during that time. This, the Court said, was not aid to religion but no more than an accommodation of the school schedule to the religious needs of the children. But suppose that law forbids school to be in session during the time of religious instruction; and suppose it went further and made it a criminal offense for the children to participate in secular instruction or in any other activities while the religious class was in session. Could there be any doubt that such a law would be in aid of religion and violative of the First Amendment even though it did not expressly impose upon anyone "attendance upon" religious instruction?

This, we submit, is the situation here. The legislative intent to aid religion by closing all roads other than those leading to church seem to us to be incontrovertible.

3. The Sunday laws here in issue do not in fact require anyone to rest on Sunday. They merely require some trades, businesses and occupations not to operate on that day. They impose no obligation of rest upon those businesses—almost too numerous to count—that are permitted to operate on Sunday, and nothing in the Sunday laws prohibits persons from engaging in a forbidden business for six days of the week and in a permitted business on Sunday. Such a person could engage in business seven days each week without any rest and yet would not violate the statutes here in issue.

The businesses permitted by the statutes here in issue undoubtedly employ hundreds of thousands of persons in Massachusetts and Pennsylvania. As far as these statutes are concerned these persons may work seven days a week. Indeed, in one instance at least, the Massachusetts statute not merely permits but encourages work seven days each week. The opening sentence of the second paragraph of Section 6 of the Massachusetts statute permits the sale of tobacco only by those "newsdealers whose stores are open for the sale of newspapers *every day in the week.*" What kind of health or welfare law is it that places a premium upon working seven days a week?

4. Actually the predominant purpose of the statutes is not to ensure rest but to prevent defilement of the Sunday Sabbath. They are aimed not at persons but at businesses. They seek to prevent secularization of the

Lord's Day. If that were not so, why select the Lord's Day as the one day of the week upon which persons shall rest? So far as health is concerned, it makes no difference whether a person rests every Wednesday or every Sunday. Why should not each business owner decide for himself the day of the week on which he will refrain from operations? Businesses are conducted in the open and there would be no practical difficulties in enforcing such a law. In Great Britain and in some dozen or so states in this country, persons who observe a day other than Sunday as their day of rest are permitted to operate their businesses on Sunday. Pfeffer, *Church, State and Freedom*, p. 230. These exemptions have been on the law books for many years and there is no evidence that enforcement has been impracticable anywhere.

5. That the primary purpose of the statutes here in issue is not to insure one day of rest in seven is established by the fact that both Massachusetts and Pennsylvania have laws completely independent of the Lord's Day statutes here in issue, that require one day of rest in seven. Chapter 149, §48, of the Massachusetts General Laws provides that "Every employer of labor engaged in carrying on any manufacturing, mechanical or mercantile establishment or workshop in the commonwealth shall allow every person * * * employed in such manufacturing, mechanical or mercantile establishment or workshop at least twenty-four consecutive hours of rest * * * in every seven consecutive days." This, we submit, is a true health or welfare law. It does not designate the twenty-four hour period, for it recognizes that as far as rest is concerned twenty-four hour periods are fungible. It is

religion, not health, that makes one particular twenty-four hour period unique and superior to all the others.

Pennsylvania, like Massachusetts, has enacted a series of genuine labor laws comprehensively covering this subject. See, e.g., Act of July 25, 1913, P. L. 1024, §3, as amended, 43 Purd. Stat. §103(a) (Women cannot work more than six days in any one week); Act of May 13, 1915, P. L. 286, §4, as amended, 43 Purd. Stat. §46 (persons under the age of 18 cannot work more than six consecutive days in any one week); Act of May 27, 1897, P. L. 112, §1, 43 Purd. Stat. §361 (bakery workers cannot work more than six days in any one week); Act of March 31, 1937, P. L. 159, §1, 43 Purd. Stat. §481 (employees of motion picture theatres must be given one day of rest per week).

6. The religious nature of Sunday laws is further evidenced by the nature of those who promote and defend them. The chief protagonists of such laws in the United States are the Lord's Day Alliance, an agency of Protestantism, and the Roman Catholic Church. Pfeffer, *Creeds in Competition*, p. 109-110. In the Massachusetts case herein, briefs *amici curiae* were filed on the one side by an association of Seventh Day Adventists and on the other by the Lord's Day League and the Archdiocesan Council of Catholic Men. In the Pennsylvania case a brief *amicus* was submitted by the Rabbinical Association of Philadelphia, the Philadelphia Board of Rabbis and the Jewish Community Relations Council of Greater Philadelphia.

We submit too, that a fair, objective consideration of all the evidence, contemporary as well as historical, leads but to one answer: The compulsory Sunday observance statutes challenged herein are religious laws and their enforcement is interdicted by the First Amendment's ban on laws respecting an establishment of religion.

II. The Massachusetts and Pennsylvania Sunday laws restrict the free exercise of religion in violation of the First Amendment.

A. Establishing Religion and Prohibiting Its Free Exercise

The prohibition against laws prohibiting the free exercise of religion in the First Amendment to the Federal Constitution, like the ban on laws respecting an establishment of religion, is made applicable to the States by the Fourteenth Amendment. *Cantwell* v. *Connecticut, supra; Marsh.* v. *Alabama, supra; Kedroff* v. *St. Nicholas Cathedral, supra.*

If, as we have sought to establish, the Sunday laws are laws respecting an establishment of religion, they are also laws prohibiting the free exercise thereof. Any law which "forces or influences a person to go to or remain away from church" or punishes him "for entertaining or professing religious beliefs or disbeliefs" (*Everson* case, *supra; McCollum* case, *supra*) is obviously a law prohibiting the free exercise of religion as much as it is a law respecting an establishment of religion.

We contend, however, that even if the statutes here in issue are not religious laws, but are motivated purely by health considerations and, nowithstanding their religious origin, they are now to be deemed an exercise of the State's police power to protect welfare, they are nevertheless unconstitutional infringments upon the religious liberty of the appellee in the Massachusetts case and the appellants in the Pennsylvania case, as well as upon all others who observe a day, other than Sunday, as their religiously required day of rest.

B. *The Sunday Laws as Restrictions on Religious Liberty*

We do not believe extended argument is necessary to establish that the Sunday law restricts the religious liberty of those whose conscience requires them to observe a day other than Sunday as their religious day of rest. We do not consider either realistic or valid the almost cavalier statement of the Massachusetts court in *Com* v. *Has, supra,* that "any one who deems another day more suitable for rest or worship may devote that day to the religious observance which he deems appropriate." Requiring such a person to abstain from engaging in his trade or business two days each week whereas his Sunday observing competitor is required to abstain only one day a week obviously imposes upon the former a competitive disadvantage and thus penalizes him for adhering to his religious beliefs.

The fact that an economically costly alternative is present does not remove the compulsion. Many small Sabbatarian merchants simply cannot continue in business under so severe a competitive disadvantage and have no choice but to yield their means of livelihood or compromise their religious convictions. Even those who can manage to survive suffer substantial economic loss. The First Amendment's ban on laws prohibiting the free exercise of religion is to be construed broadly to include within its prohibition laws permitting the exercise of religion only on the suffering of a financial loss. It is the free, not the purchased exercise of religion that is protected by the Amendment. The financial sanction imposed by a state for observing a day other than Sunday as holy time is certainly more serious economically than the imposition of a license tax

for preaching, which this Court has twice held to be an unconstitutional restriction on religious liberty. *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Follett* v. *Town of McCormick*, 321 U. S. 573.

In large measure the history of the free exercise of religion clause of the First Amendment is a history of the struggle to be free of economic sanctions for adherence to one's religion. Direct penal compulsion to adhere to certain religious beliefs or to transgress others had practically completely disappeared by the time the First Amendment to the Constitution was written. "Compulsory attendance upon religious exercises," said Mr. Justice Rutledge in *Everson*, (330 U. S. 1, 44), "went out early in the process of separating church and state". The struggle for religious liberty when the Bill of Rights was adopted was substantially a struggle against taxation for religious purposes.

As pointed out in *Everson*, (*ibid*, at 11-14), the First Amendment's guarantee of separation of church and state and of religious liberty grew out of the successful struggle in Virginia to defeat a measure seeking to impose a small tax for religious education. Defeat of the measure was followed speedily by the enactment of Jefferson's immortal statute for religious freedom. That statute provided that it was sinful and tyrannical to compel a man to furnish contributions for the propagation of opinions which he disbelieves and abhors and that it was also wrong to force him to support this or that teacher of his own religious persuasions. The statute, in language which is particularly appropriate here, stated: "That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, *nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall other-*

wise suffer on account of his religious opinions or beliefs, but that all men shall be free to profess and by argument to maintain their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities." (Emphasis added.)

Enactment of the Virginia statute was followed within five years by the adoption of the First Amendment. In *Reynolds v. United States*, 98 U. S. 145, 164, and *Davis v. Beason*, 133 U. S. 333, 342, as well as in the *Everson* case, this Court recognized that the history of the struggle in Virginia is part of the legislative history of the First Amendment.

We submit, therefore, that both the history of the Amendment and the decisions of this Court leave no doubt that governmental imposition of economic sanctions on the practice of religion constitutes an infringement upon its free exercise which, unless justified, violates the Amendment.

Nor, we submit, is it material that the economic sanction is indirect rather than direct, i.e., no fine is imposed by either Massachusetts or Pennsylvania for a Sabbatarian's exercise of his privilege of refraining from secular affairs on Saturday. The decisions of this Court make no distinction between indirect and direct economic sanctions on the exercise of a right guaranteed by the First Amendment, so long as the causal connection is clear. The various decisions on statutes seeking to bar subversives from government employment or from particular private industries or professions all are illustrations of indirect restrictions upon the exercise of First Amendment rights. For example, in *American Communications Association v. Douds*, 339 U. S. 382, which upheld "the non-Communist

oath" required by the Taft Hartley Act, there was no criminal penalty or direct economic sanction imposed upon membership in a subversive organization. The sole consequence of such membership was the indirect one of disqualification for holding office in a labor union seeking the benefits of the Labor Relations Act. Nevertheless, this Court recognized that, except for the overriding need to protect interstate commerce from political strikes, the provision would have constituted an unconstitutional infringement upon the freedom of association guaranteed by the First Amendment.

In *Adler* v. *Board of Education*, 342 U. S. 485, a similar holding was made in respect to a New York statute barring members of subversive organizations from employment as public school teachers. In *Speiser* v. *Randall*, 357 U. S. 513, this Court recognized that denial of tax exemption to persons and organizations advocating the overthrow of the government by force and violence may constitute an infringement upon their freedom of speech under the First Amendment.

Numerous similar instances can be cited.[2] They all point clearly to the conclusion that the fact that the economic sanction imposed for the exercise of the First Amendment right is indirect in its application does not render the constitutional guarantee inapplicable. In all cases this Court has recognized the reality of the situation and has applied the constitutional guarantee in a mean-

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[2] E. g. *United States ex rel. Milwaukee Social Democratic Publishing Company* v. *Burleson*, 255 U. S. 407 (second class mailing privilege); *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716 (subversives barred from civil service); *Thomas* v. *Collins*, 323 U. S. 516 (registration of labor organizations); *United Public Workers of America* v. *Mitchell*, 330 U. S. 75 (Hatch Act).

ingful way. We submit that these decisions are applicable here and require determination that the statutes under attack in these cases infringe upon freedom of religion.

C. Religious Liberty and the States' Police Power

Of course, the fact that the assailed Sunday laws restrict religious liberty does not for that reason alone render them unconstitutional. There can be no doubt that the religious freedom guaranteed by the First Amendment to the Federal Constitution does not embrace absolute "freedom to act" and that all conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-304. Concededly, the First Amendment does not preclude proscription of polygamy, breaching the peace or child labor. *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Prince* v. *Massachusetts*, 321 U. S. 158. We may also concede that religious conviction in seven days' labor weekly would not render unconstitutional a statute requiring one day rest in seven. Cf. *Jacobson* v. *Massachusetts*, 197 U. S. 11 (compulsory vaccination statute).

Nevertheless, the usual presumption of constitutionality supporting legislation is balanced in legislation regulating rights secured by the First Amendment, by "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment." *Thomas* v. *Collins*, 323 U. S. 516, 530; *Marsh* v. *Alabama*, 326 U. S. 501, 509; *Prince* v. *Massachusetts*, 321 U. S. 158-164. Hence, any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."

Thomas v. *Collins*, 323 U. S. 516, 530. See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639.

It is not sufficient to establish that a clear and immediate danger exists. It must be established with equal clarity that the restriction imposed upon the rights guaranteed by the First Amendment is necessary to meet the danger. Ordinarily if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable. *United States* v. *Carolene Products*, 304 U. S. 144. But for legislation abridging a liberty secured by the First Amendment, a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins*, 323 U. S. 516, 530. "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96. See also, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639.

Measured by this standard, the assailed Sunday laws cannot stand as enforced against the parties herein. The danger which it purportedly seeks to avert are (1) the hazard to health resulting from uninterrupted labor, and (2) the prevention of interference with the basic religious

character of the day. But if practicable means exist to avert those dangers without infringing upon religious freedom, the First Amendment imposes upon the States of Massachusetts and Pennsylvania an obligation to avail themselves of those means. The evils against which the statutes here in issue are purportedly aimed can readily and easily be averted without restricting the religious liberty of persons observing a day other than Sunday as holy time. As to the health hazard, two simple methods are available: either a simple one-day rest in seven statute applicable to all persons, as Massachusetts G. L., Chapter 149, §48, is made applicable to employees, or a provision in the Sunday law itself exempting from its operation those who observe another day as their religious day of rest. The existence of §48 of Chapter 149 is adequate evidence that the former method is practicable. That the second method is practicable is evidenced by the various State statutes that do contain or have been interpreted to contain such an exemption. (General Statutes of Connecticut, Revision of 1949, §8609; Illinois Smith-Hurd Annotated Statutes, Chapter 38, §549; Burns Indiana Statutes (1933) Chapter 43, §10-4301; Iowa Code Annotated, Chapter 729, §1; Kentucky Statutes of 1903, 436, 150; Maine Laws, Chapter 121 §36; Michigan Statutes, Volume 13, §18.855; Page's Ohio General Code Annotated, §130.5; Oklahoma Statutes 1951, Title 21, §909, as construed in *Krieger* v. *State*, 12 Okla. Cr. 566, 160 Pac. 36; *State* v. *Cheaney*, 29 Okla. Cr. 251, 233 Pac. 236; West Virginia Code of 1943, Annotated, §6073; Wisconsin Statutes, §351.52).

Nor can it be successfully urged that Sunday must be designated the day of rest for all persons because permitting a minority to engage in their usual occupations

would disturb the repose of the majority, who observe Sunday as their day of rest, and thereby interfere with the basic religious character of the day. This Court can judicially note that the retail sale of food involved in the Massachusetts suit is far less likely to disturb the peace and repose of the neighborhood than the numerous professional sports permitted by §21-32 of the Massachusetts statute. In any event, the objection can be met by the simple expedient of conditioning the exemption upon operating in such manner as not to interrupt or disturb others in their observance of Sunday as a day of rest.

We submit, therefore, that the evil which the Massachusetts and Pennsylvania Legislatures purportedly seek to avert can be practicably avoided without infringing upon the religious liberty of Christians and Jews who observe Saturday as their holy day of rest. It follows, therefore, that the statutes here in issue are unconstitutional at least as to these Christians and Jews.

III. Because of the complete irrationality of their inclusions and exclusions, the Massachusetts and Pennsylvania Sunday laws constitute deprivations of liberty and property without due process of law and denials of the equal protection of the laws, in violation of the Fourteenth Amendment to the Federal Constitution.

A. The Requirement of Equality

Even if the Sunday laws here in issue are deemed an exercise of the States' police power for the protection of the citizens' health, they are nevertheless unconstitutional if, without justification, they operate unequally or discriminatorily. The inhibition of the Fourteenth Amendment that

no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminatory and hostile legislation. *McPherson* v. *Blacker*, 146 U. S. 1, 39. The States' police power must be exercised consistently with the "equal protection" clause. *Skinner* v. *Oklahoma*, 316 U. S. 535.

Concededly, the guaranty of equal protection does not preclude legislative classification. *Goesaert* v. *Cleary*, 335 U. S. 464; Trussman and Ten Broek, "The Equal Protection of the Laws," 37 *Calif. L. Rev.* 341, 348. Moreover, we may also concede broad discretion to the Legislature in arriving at a classification. *Borden's Farm Products, Inc.* v. *Baldwin*, 293 U. S. 194. Nevertheless, some reasonable basis for a legislative classification must appear. *Jones* v. *Union Guano Co.*, 264 U. S. 171; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150. Legislative inclusion and exclusion which rests exclusively upon caprice does not satisfy the constitutional requirement of equality. *Binney* v. *Long*, 299 U. S. 280; *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422; *Morey* v. *Doud*, 354 U. S. 457, 466.

Capricious classifications affecting the livelihood of citizens constitutes not only a denial of the equal protection of the laws but likewise a deprivation of liberty and property without due process of law. *Meyer* v. *Nebraska*, 262 U. S. 390; *Pierce* v. *Society of Sisters*, 268 U. S. 510. The due process clause precludes arbitrariness by government.

B. The Inequality of the Sunday Laws

No matter how generous the courts may be in respecting legislative classifications, some semblance of rationality must be present in the statutory scheme to sustain the law, else the courts abandon the responsibility imposed upon them by the Fourteenth Amendment. No such semblance of rationality can be found in the statutes here in issue. As far as we can see, nothing but caprice can adequately explain the inclusions and exclusions of the laws. Specifically, we urge that inclusion of a retail food market such as that operated by the plaintiffs in the Massachusetts case, and the retail stores in the Pennsylvania case cannot be justified by any considerations entitled to judicial acceptance.

What reason can lie behind a law which, as the Massachusetts statute does, permits the sale of tobacco on Sunday but prohibits the sale of foods? Why should it be possible to sell confectionary on the Lord's Day but not meat? Is it less tiring to sell gasoline and oil than it is to sell lamb chops that the former should be allowed and the latter forbidden? Why should the wholesale disposition of fish be lawful and the retail disposition of the same fish unlawful? Why should a bootblack be permitted to ply his trade on Sunday before 11 A.M. but a barber not at all?

The test cannot be that of importance to the community, for it can hardly be said that it is more important to attend a professional football game than to have one's hair cut. The test cannot be that of disturbance of the rest and repose of the community, for retail selling of foods, which is prohibited, certainly does not disturb the neighborhood's rest and repose more than a baseball double-header, which

is permitted. If the sale of "frozen desserts and/or frozen dessert mix" is allowed on the ground that they are perishable, why is the sale of even more perishable uncooked meat forbidden? Why should it be licit to make butter and cheese on Sunday but illicit to sell it? What justification can explain a statutory distinction between "unpaid work on pleasure boats" and equally unpaid work on pleasure land vehicles? Is there any rationality in a statute that permits the retail sale of tobacco products by newsdealers "whose stores are open for the sale of newspapers every day of the week," but not by those who keep their stores closed some day of the week in order to get the rest and repose which it is the purported purpose of the statute to insure?

What is true of Massachusetts is equally true of Pennsylvania. There may be some variations in the inclusions and exclusions but the pattern—or, more accurately, absence of pattern—is the same. In *Commonwealth* v. *Cavalerro* (decided April 20, 1960) Judge Alexander in the Quarter Sessions Court of Philadelphia, described the operation of the Pennsylvania statute as follows:

> This law forbids a clerk to sell to my blind neighbor a Dylan Thomas recording, but does not prohibit the same clerk from selling me a book containing exactly the same poems from the next counter. Side by side in Bargain City and many other stores are tricycles, which cannot be sold to me for my two-year old granddaughter because they are toys, and adult bicycles which I can buy for myself or for my daughter just out of her teens. A clerk may sell me seat covers for my automobile, but he cannot sell me slip covers for my sofa. If I have forgotton to shop for a birthday present for my wife during the week, the same store

may sell me on Sunday without violating this law a camera, ice skates or a dozen roses, but not a watch or a suitcase or a tie pin for myself. It cannot sell me a *toy* rubber football for the four-year old, but this law does not prohibit the sale of a football for the teenager, for one is a *toy* and the other is not, and *sporting goods* are not covered by this law.

These examples could be multiplied endlessly by anyone strolling through Bargain City, a department store or a drug store with a copy of the law in his hand and the law must be kept in hand or exactly memorized, because there is no intelligible logical principle by which one may determine what is excluded and what is included.

A number of State courts have recognized the caprice underlying compulsory Sunday observance laws with patterns far less reminiscent of crazy quilts than the Massachusetts and Pennsylvania Sunday law here in issue. In *Denver* v. *Bach*, 26 Colo. 530, a city ordinance which required certain types of retail stores to remain closed on Sunday and allowed others to remain open was declared arbitrary and unconstitutional. Some years later the Colorado Supreme Court invalidated a statewide Sunday law exempting certain enumerated forms of business and declared that the statute had "the vice of discriminating where there is no basis for discrimination". *Allen* v. *Colorado*, 101 Colo. 498.

In *Elliot* v. *State*, 29 Ariz. 389, the Court held that a law cannot constitutionally prohibit the engagement in some businesses on Sunday while allowing similar businesses to operate on that day.

In *Mt. Vernon* v. *Julian*, 369 Ill. 447, the Court considered the validity of a municipal Sunday closing ordinance

containing some, but far from all, of the exemptions contained in the law here in issue. Under that ordinance, hotels, restaurants or other eating places, drug stores, tobacco stores, confectionery stores, newsdealers, ice dealers and gasoline filling stations were exempt, while other businesses were not. "Under this ordinance," said the Court, "a bakery which sells bread must be closed but a shoe shining shop which sells cigars and newspapers is unaffected * * *. These distinctions appear to us to be entirely arbitrary without relation to the public health, safety, morals or welfare." The law was, therefore, struck down as violative of both the Federal and State Constitutions. Similar holdings are found in *Springfield* v. *Smith*, 322 Mo. 1129, 19 S. W. 2d 1; *Gestano Bocai and Sons Co.* v. *Lawndale*, 208 Cal. 720, 284 Pac. 654; *Ex Parte Ferguson*, 70 P. 2d 1094 (Okla. Ct. Cr. App.); *Ex Parte Hodges*, 83 P. 2d 201 (Okla. Ct. Cr. App.); *Kelly* v. *Blackburn*, 95 S. 2d 260 (Fla.); *Henderson* v. *Antonacci*, 62 S. 2d 5 (Fla.).

Gronlund v. *Salt Lake City*, 194 P. 2d 464 (Utah) involved a local ordinance of Salt Lake City which listed certain commodities which were excepted from the Sunday closing ordinance. The Court said:

> "* * * even bearing in mind the rule that the classification upon which a Sunday closing law is based is within the discretion of the legislative branch and hence will be upheld unless clearly arbitrary, it is difficult to conceive of a fair reason for some of the items excepted * * *. The classification being on a commodity basis, it is arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or * * * coffee." (p. 468)

We respectfully submit that no matter how liberal the term equality is construed, no matter how broad the Legis-

lature's discretion may be, the Massachusetts and Pennsylvania Sunday laws are so lacking in any appearance of rationality in respect to the distinction between activities permitted on Sunday and those prohibited and with respect to persons permitted to engage in business on Sunday and those forbidden to do so that they must be adjudicated completely arbitrary. Their enforcement, therefore, constitutes both a deprivation of liberty and property without due process of law and a denial of the equal protection of the laws.

Conclusion

For the reasons herein stated we respectfully submit that the decision in the Massachusetts case should be affirmed and the decision in the Pennsylvania case should be reversed.

Respectfully submitted,

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Appendix

Massachusetts General Laws, Chapter 135, Observance of the Lord's Day

"Sec. 5. Keeping Open Shop, etc., and Doing Certain Work, etc., Prohibited.

Whoever on the Lord's day keeps open his shop, warehouse or workhouse, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars. (CL 133, Secs. 1, 2; 1692-3, 22, Sec. 1; 1716-7, 13, Sec. 1; 1727-8, 5, Secs. 1, 4; 1760-1, 20, Secs. 2, 9; 1782, 23, Sec. 1; 1791, 58, Sec. 1; 1796, 89, Sec. 1; RS 50, Sec. 1; GS 84, Sec. 1; 1862, 152; PS 98, Sec. 2; 1895, 434, Secs. 2, 4; RL 98, Secs. 2, 5; 1904, 460, Sec. 2; 1909, 423, Sec. 4; 1918, 257, Secs. 336, 338; 1919, 5; 1920, 2.)"

"Sec. 6. Limit of Operation of Preceding Section.

The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between

the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work

on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equipment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon; of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of

fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land; and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termination thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house as shall not cause unreasonable noise having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibition held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section 4A or section 4B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him. (RS 50, Sec. 10; GS 84, Sec. 9; PS 98, Sec. 13; 1886, 82; 1887, 391, Sec. 2; 1893, 41; 1895, 434, Sec. 2; 1900, 440; 1901, 80; RL 98, Secs. 3, 4; 1902, 414, Sec. 1; 1908, 126, Sec. 1; 273, Sec. 1; 333; 343; 1909, 420, Sec. 2; 423, Sec. 5; 1910, 327; 1911, 328, Sec. 1; 1914, 757, Sec. 1; 1916, 146, Sec. 1; 1917, 207; 1927, 175; 1928, 234; 1929, 118; 1930, 143; 179; 1931, 240; 1932, 96; 1933, 150, Sec. 3; 1934, 328, Sec. 7; 1934, 354; 1934, 373, Sec. 6; 1936, 129; 1937, 286; 1938, 143; 1943, 473; 1946, 207, Sec. 4; 1949, 190; 1950, 56, Sec. 1; 1950, 322; 1950, 681; 1951, 504; 1954, 217; 1955, 304, apprvd. April 22, 1955; on the same day declared by the Governor to be an emergency law, effective therewith.)"

Pennsylvania Sunday Law

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense * * *" P. L. No. 212, 18 Purd. Pa. Stat. Ann. §4699.10.